No. 3897

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TOMMY PAYNE,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDW. E. CUSHMAN, *Judge*

BRIEF FOR THE APPELLANT.

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BRIEF FOR THE APPELLANT.

STATEMENT.

This action was brought by Tommy Payne, a full blooded Indian of the Quileute tribe, to compel the Secretary of the Interior to allot to him a certain described tract of land within the Quinaielt Indian Reservation in the State of Washington. The eligibility of the plaintiff to receive an allotment on this particular reservation is conceded

and not contested by the Government. The only question involved in this case in whether or not the particular tract, as selected by the plaintiff, is available for allotment purposes under the existing laws.

In answer to the plaintiff's Petition the Government alleged that the land selected by the plaintiff and described in said Petition, is not such land as is or would be available for agricultural or grazing purposes, but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes. To this answer a demurrer was interposed by the plaintiff. Upon the hearing the trial court sustained the plaintiff's demurrer to this portion of the Government's defense but, on account of the broad denials contained in the answer, the demurrer as a whole was overruled. However, upon the trial of the case, evidence pertaining to this particular defense was admitted by the court for the purpose of the record.

The trial court in its decision, allowed the plaintiff the relief as he prayed for in his petition. From this decision the Government prosecutes this appeal.

SPECIFICATION OF ERRORS.

First. That the District Court erred in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

Second. That the District Court erred in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States and that the plaintiff is lawfully entitled to have such land allotted to him.

Third. That the District Court erred in finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor.

Fourth. That the District Court erred in adjudging that the plaintiff was entitled to a decree

adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

Fifth. That the District Court erred in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the Treaty made and entered into by the United States and said Quileute Tribe and Band of Indians.

Sixth. That the District Court erred in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his right to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve and build upon said land.

ARGUMENT.

While the foregoing errors have been separately enumerated, the only question involved in this appeal is whether the particular tract selected by the plaintiff for allotment is actually available under existing laws, for this purpose. In view of this situation, the errors will be discussed as a whole rather than individually in this argument.

Under the Act of Congress of February 8th, 1887, (24 Stat. L. 388), as amended, the President of the United States is authorized to allot Indian Reservation lands:

"* * * whenever in his opinion such reservation, or any part thereof, may be advantageously utilized for agricultural or grazing purposes by such Indians * * *"

It is the contention of the defendant that, under the Act of Congress, cited above, that the law did not contemplate the allotting of heavily timbered tracts of land such as the selection at issue in this case.

The land selected by the plaintiff is heavily timbered as shown by the report introduced in evidence and marked as "Defendant's Exhibition 'A' "

in this case. The report further shows that this particular tract has very little value except for the value of the timber. The timber is estimated as being worth $3900.00. Section 4230 U. S. Comp. Stat. provides that timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior and the proceeds from such sales to be used for the benefit of the Indians of the reservation. There is no law permitting the allotment of the land and reserving these timber benefits to the Indians of the reservation. Consequently, if the Indians of the Quinaielt reservation are to be benefitted by the timber on the unallotted lands of the reservation, the timber will have to be removed and sold prior to allotment. It is the defendant's contention that the land will have to be cleared of this timber before such land is subject to allotment since its present value is only a timber value and as such the land cannot be classified as agricultural or grazing in character.

It has been held that land which is valuable for minerals contained therein is not subject to allotment. This situation arose in the case of *Collins v. Bubb*, cited in 73 Fed. 735. This was an action against the agent in charge of the Col-

ville Reservation in Washington to enjoin him from expelling the plaintiff from the limits of the Reservation and thus preventing the plaintiff from carrying on his mining operations. The plaintiff contended that that part of said Reservation which embraced his mining claim had been restored to the public domain under the Act of Congress of July 1st, 1892 (27 Stat. L. 62). This Act permitted allotments to Indians as provided in the Act of Congress of February 8th, 1887. In construing these acts Judge Hanford said:

"The law, by mandatory words in the present tense, annuls the executive order creating the Reservation as to said tract and restores the same to the public domain subject only to the rights of the Indians to make selections of lands to be allotted to them in severalty. *The lands valuable for the minerals contained therein are not subject to be selected for allotment to the Indians. It is the intention of the law, in providing for allotments of land in severalty, to award to each Indian agricultural land to be his home.*"

If this Act is inconsistent with the treaty of July 1st, 1855 (12 Stat. L. 971) it, to that extent, supersedes the treaty, yet the defendant is in accord with the principle that it is the duty of the court to give full effect to both "where it can reasonably be done." The Department of Interior

is, and always has been willing to give full credit to every right conferred upon the Indians by any treaty or statute keeping in mind, however, that the affairs must be administered for the benefit of the tribe as a whole.

According to the evidence in the case, there was not a single allotment made on the Quinaielt Reservation until long after the Act of February 8th, 1887, *supra*. The provisions of the statute differ from the provisions of the treaty in such manner as to make the former preferable from the view point of both the Indians and the Government. While the two may not be positively incompatible *it is altogether impracticable to give full effect to both.*

In view of the impracticability of observing both the treaty and the statute and in consideration of the greater adaptability of the provisions of the statute over those of the treaty, the Act of February 8th, 1887, *supra*, as amended, was long ago held by the Department of Interior to be the law governing the allotting of lands on that reservation and it is absolutely right and greatly to the benefit of the tribe that it should be so.

The treaty provides for allotting lands to only

those Indians who *are willing to locate on the same as a permanent home.* The provisions of the subsequent statute do not even require the allottee to reside on the allotment. This marked advantage of the statute over the treaty is of special significance when applied to the peculiar conditions obtaining on the Quinaielt Reservation and may be briefly summarized as follows:

1. These Indians are fishermen by trade and have of necessity collected in villages at those points on the streams where fishing can be carried on most successfully.

2. The lands on the reservation, except small areas along the streams, are so poorly adapted to any domestic industry, and are so devoid of the surroundings conducive to a home and so inaccessible that it would be practically impossible for the allottees to establish a permanent home on their allotments except in comparatively few instances.

These conditions explain why not a single allotment was made on this reservation under the provisions of the treaty, although a period of more than thirty years elapsed between the date of the treaty, July 1st, 1855 and the passage of the Act of February 8th, 1887, *supra.*

The subsequent statute, under which the allotments on this reservation were finally made, provides for allotments to individuals in all cases —not by families where the children are minors —as provided in the treaty. Had the Department of Interior attempted to assign allotments under both the treaty and the statute or should it now attempt to do so, the task of adjusting the rights of allottees by families (under the treaty), as compared with their rights as individuals (under the statute), would result in endless confusion and would carry no advantages for either the Indians or the Government. Consequently the subsequent statute has been held and regarded by the Department as the governing law.

While this construction by the Department is in no wise binding upon the Court, yet, nevertheless it has been repeatedly held by the Supreme Court of the United States and various circuit and district courts, that where the meaning of a statute is doubtful, great weight is given to the construction placed upon it by the Department charged with its execution.

Swigart v. Baker, 229 U. S. 187; 33 Sup. Ct. 645; 57 L. Ed. 1143.

Jacobs v. Pritchard, 223 U. S. 290; 32 Sup. Ct. 289; 56 L. Ed. 405.

United States v. Hermanos, 209 U. S. 337; 28 Sup. Ct. 532; 52 L. Ed. 821.

Blanset v. Cardin, et al., 261 Fed. 309;

Bethlehem Shipbuilding Corp. v. West and Dodge Co., 269 Fed. 100 and cases cited.

Another angle to the instant case pertains to the discretionary power vested in the President to determine the character of Indian reservation lands to be allotted. The particular language in question is quoted as follows:

"* * * the President shall be authorized to cause the same (reservation), or any part thereof, to be surveyed or resurveyed whenever in his opinion such reservation, or any part thereof, may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest * * *"

The defendant contends that this provision of the law vests in the President the power to determine whether an allotment selection is of such character as to be utilized for agriculture or grazing, and also the power to reject any such selection that he may decide does not meet the requirements of the law. If this be not so then the questions arise as to (1) whether the President must use his discretionary power by refusing to have reser-

vation lands surveyed if he does not deem them suitable for agriculture or grazing, or (2) whether he may have the whole or a part of the reservation surveyed at any opportune time, and then use his discretion as to approving only such allotment selections as are suitable for agriculture or grazing.

The latter plan is not only more feasible but appears to be more in accord with the intention of Congress in enacting the law. Surveying the lands is merely incidental to the allotting of the lands that are suitable.

Unless the lands are surveyed it is difficult to see how the President can intelligently formulate an opinion as to whether or not the land "may be advantageously utilized for agricultural or grazing purposes." If, after survey, the lands appear to come within the classification that they "may be advantageously utilized for agricultural or grazing purposes" in the opinion of the President, he then is vested with the discretionary power of authorizing or "causing the allotment to each Indian located thereon to be made in *such areas* as in his opinion may be for their best interest." Congress never intended to limit the discretionary power of the President after having the lands surveyed. The language of the statute is plain in this re-

spect. It reads: The President shall be authorized (not only to cause the survey to be made, but also) to cause allotment to each Indian located thereon to be made *in such areas as in his opinion may be for their best interest.*"

Consequently, if the President determined that it would be to the best interest of the tribe to cause the timber to be removed from certain areas before, in his opinion, such areas should be subject to allotment, then according to the terms of the statute, he could refuse to cause such timbered areas to be subject to allotment.

In other words, the statute, in addition to giving the President the discretionary power of causing the lands to be surveyed, also confers upon him the power to cause such allotments to be made in accordance with the best interests of the Indians themselves. If, in the opinion of the President, the lands possessed some special valuation and he considered that it would be to the best interests of the tribe not to allot such areas, that, under the statute would be his discretionary power.

Hence, in the case at bar the defendant claims that the property selected by the plaintiff possesses a value for its timber which is ten times the value

of the land and under the terms of the statute is not subject to allotment.

In the absence of an affirmative showing (1) that this particular tract, here in issue, has been surveyed in accordance with the terms of the statute and (2) for the further reason that no showing was made or proof introduced by qualified witnesses that the lands embraced within the reservation could be advantageously utilized in the opinion of the President for agricultural or grazing purposes, or (3) that such allotment if made would in the opinion of the President be for the best interests for the Indians located on said reservation, the defense is of the opinion that this cause of action should be dismissed.

Respectfully submitted,

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